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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY ANDREW DITTO,

Defendant and Appellant.

E049262

(Super.Ct.No. FSB041635)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Gail Ganaja, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On June 17, 2005, defendant and appellant Jerry Ditto pled guilty to performing a lewd act upon a child under age 14 or 15, his minor stepdaughter C.T., under Penal Code¹ section 288, subdivision (c)(1) (count 2). In exchange, the trial court dismissed the charges of lewd act upon a child under section 288, subdivision (a) (count 1), and misdemeanor child molestation under section 647.6, subdivision (a) (count 3).

The trial court sentenced defendant to supervised probation for 60 months, with various terms and conditions of probation, including: (a) serving 180 days in jail (term 1); (b) cooperating with the probation officer in a plan of rehabilitation and following all reasonable directives of the probation officer (term 4); (c) keeping the probation officer informed of his place of residence, cohabitants and pets, and giving written notice to the probation officer 24 hours prior to moving (term 7); (d) participating in a counseling program as directed by the probation officer, submitting monthly proof of attendance, abiding by the rules and regulations of the program, and being responsible for payment of all program fees (term 13); (e) registering his address with the appropriate city or county law enforcement agency under section 290 and submitting proof of current registration to the probation officer within 10 days of registering (term 14); (f) not associating with females under the age of 18, unless in the presence of a responsible adult, who is aware of the nature of his background and current offense, and who has been approved by the

¹ All statutory references are to the Penal Code unless otherwise specified.

probation officer (term 17); and (g) paying a restitution fine of \$200, plus a 10 percent administrative fee (term 20).

On February 9, 2009, a petition to revoke defendant's probation was filed; it alleged that defendant violated probation terms and conditions 4, 7, 13, 14, 17 and 20. The next day, the trial court revoked defendant's probation and set a hearing regarding the revocation petition.

On March 19, 2009, defendant denied the probation violations and the trial court set an evidentiary hearing pursuant to *People v. Vickers* (1972) 8 Cal.3d 451 (*Vickers*).

On September 14, 2009, after testimony and evidence were presented at the *Vickers* hearing, the trial court concluded that probation remained revoked and sentenced defendant to the midterm of two years as to count 2.

On appeal, defendant contends that the trial court erred in imposing a prison term rather than reinstating probation. For the reasons set forth below, we shall affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

At the *Vickers* hearing, the following testimony was presented:

In January of 2008, Probation Officer Eileen Holguin began to supervise sex offenders; she was assigned to defendant's case. Defendant's address registered with the probation department was an apartment on Golden Avenue in San Bernardino.

According to defendant's terms and conditions of probation, he was required to notify his

probation officer 24 hours prior to changing his address. Officer Holguin had voice mail that operates 24 hours a day and defendant could leave a voice mail message regarding any change of address. Defendant was also required to complete a change of address form and submit it to the probation department. Defendant further had to submit monthly mail-in reports noting any change of address. Officer Holguin personally directed defendant to contact her by telephone 24 hours prior to any change of address, in addition to submitting it in writing in his monthly mail-in report.

In February of 2008, Officer Holguin became aware of a Child Protective Service (CPS) report regarding defendant. She spoke with the CPS caseworker who informed the officer that CPS asked defendant to move out of the Golden Avenue residence. On February 20, Officer Holguin conducted a home visit at defendant's listed address. Officer Holguin contacted defendant's wife, (the wife). The wife stated that defendant had moved out of the residence and was residing in a camper trailer on his employer's property in Fontana; defendant worked as a long-haul trucker. Defendant's wife did not provide an address to the probation officer.

On March 7, Officer Holguin met with defendant at her office. Defendant informed the officer that CPS contacted him because of a complaint from his stepdaughter, that he was under investigation, that CPS asked him to move out of the Golden Avenue residence, and that the probation department supported the decision by CPS. At that time, defendant had not reported his Fontana residence to Officer Holguin. Defendant told the officer that he was living in his camper trailer that was located at

Knight Transportation, his employer in Fontana. Officer Holguin told defendant that he had to list the Fontana address as his current address in his monthly mail-in reports to probation. The officer also discussed with defendant his probation term and condition that he not have contact with females under the age of 18. Officer Holguin informed defendant that he could not move back to the Golden Avenue residence until the CPS investigation was complete. Defendant indicated that his stepdaughters would be moving out of the residence; the officer stated that if they did move out, the officer may consider allowing defendant to move back in. Officer Holguin also discussed with defendant that his wife could not be a responsible adult present when defendant associated with females under the age of 18 based on the CPS report.

On May 15, Officer Holguin attempted to visit defendant at the Fontana residence. The officer was unable to find the residence because the address provided by defendant did not exist.

On May 27, Officer Holguin left a message for defendant on the telephone number the probation department had on record.

On June 13, Officer Holguin and defendant met at her office. The officer confirmed defendant's address in Fontana, which was considered his current address.

On July 9, Officer Holguin visited with defendant at his Fontana residence. Defendant told the officer that his stepdaughters were ready to move out of the Golden Avenue residence. Defendant agreed to inform the officer as to when his stepdaughters, who were both under the age of 18, were leaving and where they were going.

On October 14, Officer Holguin drove by the Golden Avenue residence in San Bernardino. She noticed that defendant's camper trailer where defendant was living in Fontana was parked outside the residence. That evening, Officer Holguin contacted defendant at his sex offender class and spoke with him. Defendant claimed that he was house sitting for his wife and that the children were staying with friends. The officer told defendant that he did not have her prior approval. Defendant stated that his wife had been in Texas for the prior 10 days and was planning to return the next day, October 15. Defendant asked to move back to the Golden Avenue residence because his stepdaughters were moving out and CPS had dropped the complaint against him. Officer Holguin told defendant that she needed to speak with his wife and the new caregivers to confirm the stepdaughters' move. Officer Holguin asked defendant to have his wife contact the officer to discuss the matter. Officer Holguin did not give defendant permission to move into the Golden Avenue residence. Defendant's wife did not call the officer.

On January 21, 2009, Officer Holguin made a home visit to defendant's address in Fontana. Neither defendant nor his car were present. Thereafter, Officer Holguin received defendant's mail-in report which indicated that defendant changed his permanent address back to the Golden Avenue residence in San Bernardino. Defendant did not call the officer 24 hours prior to changing his residence.

On February 5, 2009, Officer Holguin made three attempts to contact defendant. She called his last known telephone number and left voice mail messages.

On February 6, 2009, Officer Holguin contacted Domingo Rodriguez, who ran the sex offender counseling program that defendant was attending, as required under his terms and conditions of probation. Defendant failed to inform the officer that he had been suspended from the program.

That day, Officer Holguin made a home visit to the Golden Avenue residence. The officer found defendant at home, upstairs with his wife, one of his minor stepdaughters, and a four-year-old female. Defendant said that his stepdaughter had just come by to pick up an item from her mother and was not living at the residence. Because Officer Holguin never gave defendant permission to return to the Golden Avenue residence and because defendant's wife was not approved as a responsible adult when underage females were present with defendant, the officer arrested defendant for his probation violations. Later, when Officer Holguin spoke with defendant in jail, defendant stated that he had not reported the Fontana address to the police under section 290.

Mark Wine, who worked for the San Bernardino Police Department in the Office of Registration and Permits—which included registering all sex offenders in the City of San Bernardino under section 290, testified. He processed defendant's annual registration in 2006, 2007, and 2008. In December of 2006, defendant listed his home on Golden Avenue, and his work address in Phoenix, Arizona. In November 2007, defendant listed the same home and work addresses. On December 9, 2008, defendant listed the Golden Avenue residence as his home but did not list a work address. Wine

testified that defendant is required to inform police of his permanent residence. If defendant moves out of San Bernardino, he is required to notify police within five days. Wine never received any change of address form or notification that defendant had left the San Bernardino City area.

Domingo Rodriguez ran a counseling program that defendant attended through the county behavioral health department. In December 2008, and January 2009, defendant informed Rodriguez that he was unemployed and did not have money to pay for his counseling sessions. Defendant indicated an interest in continuing with the program even though he did not have money. In December 2008, Rodriguez allowed defendant to attend the counseling sessions. In January 2009, defendant attended two classes but had an unpaid balance for the counseling sessions in December. Rodriguez suspended defendant from the sessions until he was able to pay for them. Rodriguez testified that defendant was aware that he had to contact his probation officer to let her know about his status regarding the counseling sessions.

The wife is married to defendant. She had been contacted several times by CPS regarding the living arrangements at the Golden Avenue residence. The wife has three daughters, E., D., and C. In February 2008, D. contacted CPS and made a complaint against defendant. Defendant was living in a camper at his work in Fontana because of his issues with CPS; he maintained the Golden Avenue residence as his mailing address.

The wife testified that her minor daughters had left the residence before she left for Texas in October of 2008. Defendant house sat on weekends. Defendant called the

wife in Texas and asked her to call Officer Holguin to verify that her daughters had moved out of the Golden Avenue residence. After the wife returned from Texas, she called the officer. The wife told the officer that her minor daughters had left and defendant moved back to the Golden Avenue residence.

The wife testified that defendant was arrested in February of 2009. The wife and defendant were in their bedroom in the Golden Avenue residence when her daughter answered the door to let Officer Holguin and her partner in. Her daughter had come from school to use a computer and had been there for less than 30 minutes. A female four-year-old child, who is her son-in-law's cousin, was upstairs in the bedroom with the wife and defendant. Her older daughter and son-in-law had left the residence to go to the store. The wife testified that it was at that time that Officer Holguin first mentioned that the wife was not a responsible adult.

Defendant testified that he was aware of the alleged probation violations. Defendant testified that, from 2008 to 2009, he kept his probation officer informed about the place of residence by submitting monthly mail-in reports. The Golden Avenue residence is the only mailing address he listed during his period of probation and for his sex registration.

In January 2008, defendant was living at the Golden Avenue residence in San Bernardino. In February, CPS came to the residence regarding a complaint about him; he did not move out. Defendant stated that he was staying in a camper at a work drop area for trucks, and slept there on occasions when he did not want to drive back home.

Defendant did not feel that he had to report the Fontana address where his camper was located because Officer Wyatt, his previous probation officer, had informed defendant that his place of employment was the West Buckeye Road address in Phoenix.

Defendant spoke with Officer Holguin about the CPS matter. Defendant testified that Officer Holguin told him that he would maintain the Golden Avenue residence as his address as long as he did not go there at night time or when his minor stepdaughters were present. Defendant claimed that during most of the period, he was driving on the road and working nights.

In October 2008, defendant spoke with Officer Holguin when he was house sitting the Golden Avenue residence for this wife. Defendant testified that Officer Holguin stated that he could move back into that residence when his stepdaughters moved out; defendant stated the stepdaughters had already moved out. Defendant claimed Officer Holguin never informed him to change the address. Instead, the officer told him to note the Fontana address as his place of employment in the monthly report. Moreover, defendant claimed that on June 13, 2008, Officer Holguin told him that he could maintain the Golden Avenue residence as his mailing address.

Defendant was aware that the terms and conditions of his probation required that he not associate with females under the age of 18 without adult supervision. Defendant stated that from 2008 to 2009, he did not associate with any females under the age of 18 unless an adult supervisor was present. Defendant testified that after Officer Holguin became his probation officer, she stated that the adult supervisor could not be his wife.

When defendant was arrested by Officer Holguin in February 2009, his wife was present when females under the age of 18 were present at the Golden Avenue residence.

Defendant tried to participate in the counseling program, as directed by his probation officer. He attended the weekly sessions as long as he was able to pay.

After argument by defendant's counsel, the trial court found three primary probation violations: (1) term 14 – by associating with female minors under the age of 18; (2) term 4 – by moving back into the Golden Avenue residence in violation of Officer Holguin's instructions; and (3) term 7 – by failing to register his Fontana address for his sex registration under section 290.

III

ANALYSIS

A. The Nature of Defendant's Conduct Did Not Warrant Reinstatement of Probation

Defendant contends that the trial court erred “in imposing a prison term rather than reinstating probation because the nature of [defendant's] conduct demonstrated that he could still abide by probation conditions.”

Trial courts have great discretion in deciding whether or not to revoke probation. “Absent abuse of that discretion, an appellate court will not disturb the trial court's findings.” (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) Similarly, trial courts have discretion not to reinstate probation and their decisions are reviewed for abuse of discretion. (*People v. Downy* (2000) 82 Cal.App.4th 899, 910.) The standard of proof

for revocation of probation is a preponderance of the evidence to support the violation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.)

In this case, defendant claims that “the nature of [defendant’s] violations warranted reinstatement of probation.” We disagree.

1. Violation of Term 14

Probation term and condition 14 directed defendant to register his address with local law enforcement under section 290. Section 290, subdivision (b), requires sex offenders “to register . . . within five working days of coming into, or changing his or her residence” In addition, section 290.010 provides in part as follows: “If the person who is registering has more than one residence address at which he or she regularly resides, he or she shall register in accordance with the Act in each of the jurisdictions in which he or she regularly resides, regardless of the number of days or nights spent there. If all of the addresses are within the same jurisdiction, the person shall provide the registering authority with all of the addresses where he or she regularly resides.” (§ 290.010.)

The evidence, as summarized above, is sufficient to show that defendant resided at both the Golden Avenue and Fontana addresses. Here, after the *Vickers* hearing, the trial court found that defendant “violated the two ninety registration requirements, which is clear. Even if he still considered the Golden address as his address, he was clearly in Fontana living there, in the alternative. And even if he has two addresses, he has to register both. He didn’t.” Based on the court’s finding—which is supported by the

evidence summarized above, we cannot say that the trial court abused its discretion in imposing a prison term instead of reinstating probation.

2. Violation of Term 4

Probation term and condition 4 required defendant to “[c]ooperate with the probation officer in a plan of rehabilitation and follow all reasonable directives of the probation officer.” After the *Vickers* hearing, the trial court found that defendant violated this term by moving back into the Golden Avenue residence, in direct violation of the probation officer’s instructions. The court stated: “He moved back into the residence at the direct violation of his Probation Officer’s instructions, and to the extent that their testimony conflicts, I find the Probation Officer’s testimony to be more credible.”

As summarized above, Officer Holguin informed defendant on numerous occasions that defendant could *not* move into the Golden Avenue address until she gave defendant notice that he could do so. Officer Holguin told defendant that he could not live at the residence for the protection of the minor children and to maintain his probationary status, especially in light of his minor stepdaughter D.’s second report of defendant to CPS. From January 2008 through February 2009, Officer Holguin never gave defendant permission to move into the Golden Avenue address.

Notwithstanding, defendant argues that “it must be viewed in light of the fact that [defendant] was no longer employed around the time he had made the move.” This argument is wholly without merit.

Even if defendant could no longer reside at the Fontana address, his probation officer clearly told him he could not move into the Golden Avenue residence. He defied her order then and continues to justify his defiance with his excuse.

Based on the court's finding—which is supported by the evidence summarized above, we cannot say that the trial court abused its discretion in imposing a prison term instead of reinstating probation based on this violation alone.

3. Violation of Term 17

Probation term and condition 17 directed defendant to “[n]ot associate with females under the age of eighteen (18), unless in the presence of a responsible adult, who is aware of the nature of your background and current offense, and who has been approved by the probation officer.”

The trial court found that defendant violated this probation term. The court noted that, even if his minor stepdaughter had recently arrived at the Golden Avenue residence to stay for a brief time, a four-year-old female was present with defendant and his wife.

Defendant does not deny that he violated his probation. Despite the clear violation of his probation term, defendant attempts to minimize his action because his wife, another adult, was present. Although defendant admits that Officer Holguin did not approve of his wife being a responsible adult, he brings up that she had been approved by his previous probation officer. This information does not assist defendant in any way. Defendant knew that he could not be in the presence of minor girls without an approved responsible adult present. Defendant knew that his wife was not an approved adult by the

current probation officer. Defendant's blatant disregard for the probation condition by allowing himself to be in the presence of minor children without an approved adult cannot be condoned.

Moreover, defendant claims that "[s]o while [defendant] violated the probation condition that he not have contact with female minors without an approved adult supervisor, the circumstances reflect that neither girl was harmed or in danger of being harmed. Consequently, it reasonably could be characterized as a 'technical' or minor violation." Again, we disagree with defendant's characterization of the evidence. Whether the minor girls were harmed or not is not the issue. The issue clearly is whether defendant violated the terms of his probation—which he did.

Given the facts of this case and the court's careful consideration of them, defendant has failed to satisfy his heavy burden of demonstrating the trial court's order "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

B. The Trial Court Did Not Impose a Prison Term Based Solely on Defendant Using Up His Local Custody Time

Defendant contends that the trial court erred "in imposing a prison term rather than reinstating probation because [defendant] had 'used up' his local custody time."

The admission to probation is a grant of clemency. (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) When a probationer has violated the terms and conditions of probation, the court, in its discretion, may reinstate probation, with or without modified

conditions, or it may revoke and terminate probation, imposing a state prison term.

(*People v. Jones* (1990) 224 Cal.App.3d 1309, 1315 [the court's authority to modify probation necessarily presumes the power to reinstate it].)

“Sentencing choices such as the one at issue here, whether to reinstate probation or sentence a defendant to prison, are reviewed for abuse of discretion. . . . A court abuses its discretion ‘whenever the court exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.]” (*People v. Downey, supra*, 82 Cal.App.4th at p. 909.)

In this case, on June 17, 2005, pursuant to a negotiated plea agreement, defendant pled guilty to a lewd act upon a child under the age of 14 or 15 under section 288, subdivision (c)(1) (count 2). In exchange, the charges of a lewd act upon a child under section 288, subdivision (a) (count 1), and misdemeanor child molestation under section 647.6, subdivision (a) (count 3) were dismissed by the trial court. The trial court then clearly admonished defendant that he had one chance at probation and that, if he violated probation, he would go to state prison.

On September 14, 2009, after the *Vickers* hearing, the trial court noted that as part of the negotiated plea agreement, defendant pled guilty with a waiver under *People v. Harvey* (1979) 25 Cal.3d 754. Then, the trial court stated that, based on the number *and* seriousness of the probation violations, and considering that defendant had used up his local custody time, probation was not a viable option. The court noted that defendant's lack of a prior record was a factor in mitigation not to sentence defendant to the upper term of three years. Therefore, the trial court sentenced defendant to the middle term of

two years based on the three incidents alleged in the complaint and detailed in the probation report based on defendant's *Harvey* wavier.

Defendant argues that the court abused its discretion in imposing a prison term rather than reinstating probation because of the trial court's misconception that defendant had "used up his local time" under section 19.2. Defendant contends that even if defendant had used up his local custody time, defendant could have waived his local custody credit under *People v. Johnson* (1978) 82 Cal.App.3d 183, 187-189 (Fourth Dist., Div. Two). Hence, according to defendant, the trial court erred in failing to "consider the availability of a '*Johnson*' wavier . . . , which would allow the court to reinstate probation without running afoul of Penal Code section 19.2." We disagree.

Contrary to defendant's argument, the trial court did not impose a prison term "merely because [defendant] had used up his local custody time." The local custody time was only one factor in the trial court's decision. Here, as provided in detail above, defendant demonstrated a pattern of abusing his minor stepdaughters. Notwithstanding the gravity of defendant's crimes, the trial court placed defendant on probation. The court, however, warned defendant that he only had one chance at probation; if he violated his probation, he would be sent to state prison. Despite this warning, defendant failed to comply with his probation terms. Based on all these facts, we cannot discern any abuse of discretion in the trial court's imposition of a prison term instead of reinstatement of probation. In fact, based on the facts, we may very well discern an abuse of discretion had the trial court reinstated defendant's probation. Defendant's crimes and actions

showed an utter disregard for the law. Therefore, we find that the trial court properly imposed a prison term.

IV

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ King
J.